Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

SAMUEL BOLANDER,

Petitioner,

-v-

BP OIL COMPANY,
BP PRODUCTS NORTH AMERICA INC.,
AND BP RETIREMENT ACCUMULATION PLAN
Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit Court of Appeals, in claims brought under the Ohio anti-discrimination statute, Ohio Rev. Code Ann. § 4112.02 and Ohio Rev. Code Ann. § 4112.99, which in relevant part parallels the Age Discrimination in Employment Act of 1967 (ADEA), correctly held that, as a matter of law, Petitioner was unable to make out a *prima facie* case under ***McDonnell Douglas***, because he was replaced by an employee who was not significantly younger than Petitioner.

2. Whether the Sixth Circuit Court of Appeals, in claims brought under the Ohio anti-discrimination statute, Ohio Rev. Code Ann. § 4112.02 and Ohio Rev. Code Ann. § 4112.99, was required to apply Ohio law rather than federal law in determining whether Petitioner had stated a *prima facie* claim of age discrimination, where Ohio law differed from federal law in that regard.

3. Whether discriminatory comments and actions may still constitute direct evidence of age discrimination, notwithstanding that they occurred two years earlier than the adverse action of which the employee complains, and notwithstanding the fact that they occurred under the aegis of a different business unit leader who made the ultimate determination to take the adverse action, where the company officials who made the discriminatory remarks and who were involved with the discriminatory actions were also involved in the adverse action taken against the employee.

4. Whether the modifications or clarifications to ***Price Waterhouse v. Hopkins***, 490 U.S. 228 (1989), set forth in ***Desert Palace, Inc. v. Costa***, 539 U.S. 90 (2003), apply to age discrimination cases.

PARTIES TO THE PROCEEDING

Petitioner is Samuel Bolander. He was Plaintiff in the District Court and Appellant in the Court of Appeals.

Respondents are BP Oil Company, BP Products North America Inc., and BP Retirement Accumulation Plan.

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BASIS FOR JURISDICTION

The judgment of the Court of Appeals was entered on February 10, 2005.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutes involved are Ohio Rev. Code Ann. § 4112.02 and Ohio Rev. Code Ann. § 4112.99. Section 4112.02 is reproduced in the appendix.

Section 411 2.99 provides as follows:

> *Whoever violates this chapter is subject to a civil action for damages, injunctive relief, or any other appropriate relief.*

STATEMENT

This case presents questions of broad importance to the enforcement of age discrimination laws, and points out the need to allow District Courts the flexibility to recognize and to address discrimination in circumstances not amenable to rigid and mechanical application of the framework within which discrimination cases are analyzed. The case also reflects special problems in holding employers liable for discrimination which may occur during a time of rapid management change.

In ***Grosjean v. First Energy Corp.***, 349 F.3d 332, 335 (6th Cir.2003), the Sixth Circuit adopted a rigid rule that as a matter of law, a plaintiff cannot establish a *prima facie* case of age discrimination under the three-part burden-shifting test established in ***McDonnell Douglas Corp. v. Green***, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), if he was not replaced by a person at least six years his junior. While ***Grosjean*** left open the possibility that a plaintiff replaced by a person less than six years his junior might still prove age discrimination by means of direct evidence, the court in the instant case refused to consider Petitioner's direct evidence of discrimination because the ultimate decision maker at the time of the events which gave rise to that evidence was not the ultimate decision maker at the time Petitioner was terminated.

The rigidity of the Sixth Circuit's approach to age discrimination cases is in conflict with this Court's frequent recognition that the ***McDonnell Douglas*** framework was "never intended to be rigid, mechanized, or ritualistic," and is in conflict with the Ohio Supreme Court's holding in ***Mauzy v. Kelly Services, Inc.*** (1996), 75 Ohio St.3d 578, 664 N.E.2d 1272, 1273, that "a plaintiff may establish a prima facie case of age discrimination directly by presenting evidence, of any nature, to show that an employer more likely than not was motivated by discriminatory intent." Unfortunately, the court never addressed the Ohio Supreme Court's holding in ***Mauzy***, in spite of the fact that the complaint was brought under Ohio

anti-discrimination law rather than under the ADEA. The court also declined to decide whether the mixed-motive burden-shifting method articulated in ***Price Waterhouse v. Hopkins***, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) as modified by ***Desert Palace, Inc. v. Costa***, 539 U.S. 90, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003), applies to age discrimination cases, because there was not enough evidence, direct or indirect, that age was "a motivating factor" for Petitioner's termination.

A. Statutory Background

The purpose of R.C. 4112.02 is to prevent discrimination. ***Ohio Civil Rights Comm. v. Harlett*** (1999), 132 Ohio App.3d 341, 347, 724 N.E.2d 1242, 1246.

Ohio's provisions regarding age discrimination are generally intended to follow federal case law that has developed under the ADEA. ***Plumbers & Steamfitters Jt. App. Committee v. Ohio Civil Rights Commission*** (1981), 66 Ohio State 2nd 192. If and where Ohio substantive law differs from federal law, Ohio law applies.

The Ohio Supreme Court has held that "a plaintiff may establish a prima facie case of age discrimination directly by presenting evidence, of any nature, to show that an employer more likely than not was motivated by discriminatory intent." ***Mauzy v. Kelly Services, Inc.*** 75 Ohio St.3d 578, 664 N.E.2d 1272, 1273 (Ohio,1996). The Ohio Supreme Court has never adopted a rigid rule that a plaintiff must have been replaced by an individual any certain number of years younger than the plaintiff.

B. Factual Background

Petitioner started working at the Toledo refinery in 1973. JA 273.[1] He worked his way up to various management and leadership roles at the refinery. JA 274-275. He was "highly respected, highly regarded by all refinery employees, top to bottom." JA 406.

From 1994 until 1999, Rick Porter was Business Unit Leader ("BUL") at the Toledo refinery. JA 378. The BUL was the highest ranking person at the refinery. JA 364. At the time Porter took over as BUL, it was owned by British Petroleum ("BP"). In 1998, BP merged with Amoco. BP North America, Inc., currently operates the refinery.

Ken Panozzo started out at the Toledo refinery as maintenance manager, and then became asset manager. JA 362-262. He reported directly to the BUL. JA 364. Alan Clink reported directly to Panozzo. JA 365.

Panozzo was employed at Toledo refinery from about October 1999, until about September 1, 2002. His first six or seven months was spent as a maintenance manager, and then he became an asset manager. JA 361-362. He testified that he may have facilitated Petitioner's termination. Specifically, he had several "talking points" that he had prepared to explain why Petitioner was being terminated. JA 366-368.

Thomas Moroni, Turnaround Superintendent at the refinery, stated that from time to time Panozzo would consult with him concerning various personnel issues in the maintenance department, and that Panozzo on several occasions referred to Petitioner as being part of the "old guard." This was clearly said in a non-complementary critical fashion. Additionally, on several occasions Panozzo told Moroni in approving fashion that there was a "younger and more dynamic way of doing

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1. Citations (JA) are to the joint appendix filed with the Court of Appeals.

things" at the Toledo refinery. He also told Moroni on several occasions that he liked some of the younger engineers at the Toledo refinery because they were "younger and energetic." JA 247.

Among Panozzo's activities was reviewing and establishing pay grades. JA 370-372. Panozzo and Alan Clink were heavily involved in the purported investigation of certain safety violations allegedly committed by Petitioner, and in the writing of an October 4, 2000 warning letter. JA 114-115. Clink prepared Plaintiff's March, 2001 performance evaluation. JA 115-116.

In November 1999, Jeanne Johns replaced Rick Porter as the BUL. Ken Panozzo became maintenance superintendent. In November, 2001, Pat Gower replaced Jeanne Johns as BUL.

In early 2000, several months after the new management team of Jeanne Johns and Ken Panozzo had been installed, Petitioner was given a performance appraisal. The appraisal was substandard, and did not accurately reflect Petitioner's performance. JA 311.

In the middle of March, 2000, Petitioner was reduced in grade from a 21 down to a 19, and was subsequently changed to a grade H under the new grading system. JA 330. After Petitioner applied for and was denied the position of asset coordinator, Alan Clink, who along with Panozzo participated in the managerial selection process, approached Petitioner to find out what Petitioner was going to do. The position of maintenance supervisor came up and Petitioner indicated that because the position would result in another demotion, which Petitioner wanted to avoid, he was reluctant to take such a position. JA 332.

On September 1, 2000, Petitioner learned for the first time that there purportedly was an issue involving safety violations. JA 341-342. A few days later he was offered a maintenance supervisor job, at a further reduced grade. JA 343-344. From that time until he was terminated his salary was frozen. JA 345-346.

In October, 2000, Petitioner received a disciplinary action which alleged that Petitioner of had been guilty of 3 safety interactions in the past. One of the alleged violations involved confined space requirements, another involved alleged scaffolding requirements, and the third allegation involved an alleged failure to use fresh air in connection with the repair of a leak. JA 280-281. The letter indicated that further safety violations would result in additional disciplinary consequences, up to and including termination. JA 282.

In his deposition, Petitioner provided evidence from which a jury could reasonably find that the alleged safety incidents which purportedly led to Petitioner receiving a disciplinary warning letter were not safety violations at all, and that the accusations were made simply to begin building up a case against Petitioner in the eventuality of his ultimate termination. For example, with regard to what Respondents referred to in their Motion for Summary Judgment as an incident when Petitioner allegedly did not wear "fresh air" when he should have, the incident involved an emergency, where Petitioner took emergency steps to stop a flare header leak. While a work permit was later prepared, which required respiratory protection, that permit had not been prepared yet when Petitioner repaired the leak. JA 285-286. Respondent accused Petitioner of failing to wear a body harness on a scaffold, but in fact he was not required to wear a harness because the scaffold was fully OSHA-compliant. JA 283.

Respondent accused Petitioner of entering a vessel without a respirator, but as the entry supervisor on that date, he had the right to challenge respiration requirements at any time. Additionally, Petitioner had the operating supervisor with him at the time, who was ultimately responsible for making the decision whether respiratory protection was required or not, and who in fact entered the vessel with Petitioner, thus implicitly determining that respiratory protection was not required. JA 324-326.

With regard to the April 1, 2002, alleged confined space violation which purportedly caused Petitioner to be terminated, the incident consisted of Petitioner placing his head and one shoulder past the plane of the vessel body for about 30 seconds. JA 291-296. As the entry foreman, he could assume the right to act as a hole watch. Since he was not going inside to perform work, he could perform the job of a working hole watch, who was expected to reach in and out of confined spaces. Thus Bolander was doing nothing any different than what hole watches were expected to do. JA 297.

On April 1, 2002, without the presence of a "hole watch," Petitioner briefly broke the plane of a permitted confined space with his head and one shoulder, to observe whether the vessel had been cleaned. JA 289-291, 293. Entry into a permitted confined space to perform work or other activities in the space required that an attendant ("hole watch") be present to watch out for people in the vessel. JA 300-301. However, it was common practice for operations foremen and maintenance foremen to just briefly look inside the vessels without requiring the presence of a hole watch. JA 251, 290, 305, 432. Furthermore, as the executing authority or entry foreman, Petitioner was entitled to assume the role of hole watch. JA 297. Hole watches were expected to reach in and out of the confined spaces, and to make contact or communicate with the people inside. JA 297, 302. The confined space policy does not state that a hole watch is required anytime the plane is broken. JA251, 299.

On April 16, 2002, Petitioner was terminated from his position at the refinery, ostensibly as a result of the above, alleged safety infraction. JA 287.

Prior to deciding to terminate Plaintiff, Patrick Gower consulted with, among others, Alan Clink and Kenneth Panozzo. JA 111.

Robert Sauer has been employed at the Toledo refinery for 25 years. Since January, 2002, he has been a safety adviser, and prior to that was a maintenance supervisor. JA 408. He testified that after Amoco merged with BP, the personnel grading system was converted from BP grades to Amoco levels. He and other older employees were placed in levels which represented a demotion from their prior grades, while younger employees were placed in levels which represented promotions from their prior grades. JA 395-396.

Petitioner presented evidence, in the form of affidavits and depositions of numerous witnesses, that Petitioner was a highly respected employee. JA 401, 406. On the other hand, Panozzo's reputation among refinery employees was that he was a liar, that he did not appear to have much maintenance experience, and did not appear to know how to go about getting work done. JA 407.

Petitioner also presented evidence that Alan Clink, who became maintenance superintendent in 1999, and Ken Panozzo, repeatedly referred to certain people as the "old guard." JA 402, 403, 405. Panozzo also often talked about seeking "young, energetic engineers" for positions. JA 409. On at least one occasion, Panozzo made such a comment with regard to the position of maintenance department "asset coordinator," which both Robert Sauer and Petitioner applied for but were denied. JA 410. The three available positions for maintenance department asset coordinator were all filled by employees considerably younger than Sauer and Petitioner. JA 411.

The three persons selected from the maintenance group to be asset coordinators were Doug Powell, Dave Kurt, and Doug Schwartz. JA 421. Doug Powell is in his mid-30s, Doug Schwartz is about 35-40 years old, and Dave Kurt is about 35-38 years old. JA 352, 369, 373.

James Thomas, a 27 year employee at the refinery, testified that he was surprised when Powell, Kurt, and Schwartz were selected over Petitioner and Bob Sauer, because Petitioner and Sauer better fit the position. JA 422. During the 2000 reorganization, Thomas applied for the position of asset superintendent, which is a higher position than asset coordinator. JA 425, 426. However, he lost out on the position to Rick Taylor, even though Thomas was the better qualified person. JA 426-427. Taylor is in his thirties. JA 426); Thomas is 48 years old. JA 419. The person who made that decision was Bob Wallace, who is in his early or mid-thirties. JA 427-428.

Sauer testified that Petitioner was an extremely safe worker, that he was very knowledgeable in refinery hazards, and that he always took proper steps to eliminate hazards. JA 412. Sauer considered Petitioner to be "a leading authority" in the confined space procedure. *Ibid.*

Prior to Petitioner's termination, it was "an accepted and common practice at the refinery to look inside permitted confined spaces without an attendant present," and maintenance and operations supervisors routinely did so. JA 413-414. Sauer, a refinery safety adviser, testified that he was familiar with the OSHA regulations concerning confined space, and under those regulations, Petitioner had the authority to look inside the vessel without a hole watch present. JA 415-416.

Ken Panozzo himself testified that hole watches hand tools inside confined spaces as part of their normal activities. JA 376.

During the time that Thomas Moroni was at the Toledo refinery, up to the time he left in July 2000, it was normal practice for managers to break a fully permitted confined space (breaking the plane) without a hole watch present. He himself did on a number of occasions, as recently as 1999. He described the practice of managers taking a cursory view of the interior of the vessel to ensure that no contaminants or other debris had been left inside prior to closure. He is not aware of anyone having been disciplined for doing this, other than Petitioner.

Moroni stated that had someone been disciplined for doing this, he would have known about it, because there would have been an incident report which would have been widely distributed, it would have been discussed at mandatory safety meetings, and it was part of his job to be aware of safety violations. JA 247-248.

Earl Gilbert, age 62, testified by affidavit that in 2000, he applied for the position of Superintendent of Project Engineering and Turnaround. He was not selected for the position, but Ted Spidle, who was in his mid-40s, was selected. JA 249. Gilbert was far better qualified for the position than Spidle, with far more relevant experience. JA 249, 250. He retired at the end of 2000, shortly after his non-selection, because no other opportunities were open to him, except demotions. JA 250.

On about September 13, 2000, Alan Clink hinted to Petitioner that had he taken the maintenance position when it was first available, this safety issue would probably never have arisen. JA 346-347. Additionally, on or about October 5, 2000, Petitioner met with Ken Panozzo to talk about the discipline letter he had received on or about October 4. Panozzo told him that if he had taken the maintenance supervisor position on the third round of postings, which occurred July 13, 2000, the safety infractions would never have come up and there would have been no discipline letter. JA 246, 348-349.

Petitioner submitted expert testimony in the form of a report by Dr. Malcolm S. Cohen, Ph.D., consisting of a statistical analysis of demotions and salary of Toledo refinery employees by age. Dr. Cohen compared employees under age 40 to those age 40 and over with regard to demotions in 2000 and salary increases for the years 2000 and 2001. JA 168. The report showed that in the year 2000, 25 of 129 employees over 40 were demoted as compared to none of the 36 employees under age 40. *Ibid.* Dr. Cohen found that there are only 3 chances out of 1000 that all 25 of the demotions would be among persons over the age of 40. *Ibid.*

C. Proceedings Below

1. This case was originally filed by Petitioners in the Court of Common Pleas of Lucas County, OH. The case was removed to the United States District Court for the Northern District of Ohio, Western Division, by Respondents. The alleged bases for jurisdiction, which were not contested by Petitioner, were that 1) Petitioner resided in Ohio while Respondent BP Oil Company was a nonexistent entity, BP Products North America, Inc., was a corporation incorporated under the laws of the State of Maryland, with its principal place of business in Chicago, Illinois, and BP Retirement Accumulation Plan was an employee benefits plan with its principal place of business in Chicago, Illinois, and that 2) one of Petitioner's claims, which alleged violation of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 101 et seq., arose under federal law, and the amount in controversy exceeded $75,000 exclusive of interest and costs. Consequently, jurisdiction in the District Court was appropriate both on the basis of diversity of citizenship, 28 U.S.C. § 1331, and federal question jurisdiction, 28 U.S.C. § 1332.

The Complaint comprised an age discrimination claim pursuant to Ohio Rev. Code Ann. §§ 4112.02(N) and 4112.99, a claim for retaliation pursuant to Ohio Rev. Code Ann. § 4112.99, a common law claim for intentional infliction of emotional distress, and an ERISA claim pursuant to 29 U.S.C. § 101 et seq. After a period of discovery, Respondents filed a Motion for Summary Judgment on June 4, 2003. Following responsive briefing, the District Court granted Respondents' motion on August 6, 2003.

The District Court held that Petitioner could not establish a *prima facie* case because he was replaced by an individual only two or three years younger than himself, and such a narrow difference did not satisfy the necessary "substantially younger" or "significantly younger" criterion.

The court also held that Respondents articulated a legitimate reason--Petitioner's alleged noncompliance with an important safety regulation. The court rejected Petitioner's evidence that other employees had committed similar infractions in the past without being disciplined, on the basis that the prior incidents had occurred under a different plant manager.

Finally, the court rejected Petitioner's alternative reliance upon the "mixed motives" rationale of ***Desert Palace, Inc. v. Costa***, 539 U.S. 90, 123 S.Ct. 2148 (2003), on the asserted basis that the mixed motives rationale and ***Desert Palace*** did not apply to age discrimination cases.

A Notice of Appeal was timely filed on September 3, 2003.

2. A unanimous panel of the Sixth Circuit (Boggs, Guy, and Steeh, United States District Court for the Eastern District of Michigan, sitting by designation, JJ) affirmed. The court held that under the Sixth Circuit's recently issued decision in ***Grosjean v. First Energy Corp.***, 349 F.3d 332, 335 (6th Cir.2003), an age difference of less than six years was, as a matter of law, insufficient to establish a *prima facie* case of age discrimination. (***Grosjean*** was decided during the briefing of this case, between the filing of Petitioner's Appeal Brief and Respondents' Brief, and thus both Petitioner and Respondent were able to brief the issue, Petitioner doing so in his Reply Brief). ***Grosjean*** provided that direct evidence could still be used to prove a case of discrimination even in the absence of replacement by a substantially younger worker. However, in the instant case, the court held that Petitioner's direct evidence of age discrimination, consisting of ageist comments and a statistical study demonstrating that older workers were demoted at a vastly disproportionate rate over younger workers, did not

provide direct evidence that Petitioner's termination was direct evidence of discrimination against Petitioner.

Finally, the court held that, even if age discrimination complaints could be analyzed under the modified ***Price Waterhouse*** mixed-motive burden-shifting method articulated in ***Desert Palace, Inc. v. Costa***, 539 U.S. 90, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003), there was not enough evidence, direct or indirect, that age was "a motivating factor" for Petitioner's termination. This was so, said the court, because 1) Petitioner was fired for a safety violation, and, again, Petitioner's direct evidence of discrimination occurred under a previous business unit leader. The court specifically declined to determine whether ***Desert Palace*** applied to age discrimination cases.

REASONS FOR GRANTING THE PETITION

In ***O'Connor v. Consolidated Coin Caterers Corp.***, 517 U.S. 308, 312, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996), and in ***Furnco Constr. Corp. v. Waters*** (1978), 438 U.S. 567, 577, 98 S.Ct. 2943, 57 L.Ed.2d 957, this Court declined to impose a rigid formulation upon the burden shifting framework of ***McDonnell Douglas***, because that framework was "never intended to be rigid, mechanized, or ritualistic."

Some other circuit courts have recognized this Court's eschewal of a rigid and ritualistic approach to age discrimination cases, but the Sixth Circuit has adopted an approach contrary to the words and spirit of ***O'Connor*** and ***Furnco,*** by holding that, as a matter of law, an age discrimination plaintiff cannot make out a *prima facie* case if he cannot show that he was replaced by an employee at least six years his junior.

The Ohio Supreme Court has also eschewed a rigid approach to age discrimination cases under Ohio Rev. Code Ann. § 4112.02, the statute under which the instant case is brought, but the Court of Appeals failed to acknowledge the Ohio Supreme Court's controlling law.

This Court's review is warranted to reaffirm or clarify the principles set forth in ***O'Connor*** and ***Furnco***, and to resolve the circuit conflict over this issue. The Court's review is further warranted to resolve uncertainty among the several circuits as to whether the standard for making out a *prima facie* case of discrimination is a matter of procedural or substantive law under the ***Erie*** doctrine. Finally, this court should resolve the applicability of ***Desert Palace, Inc. v. Costa***, 539 U.S. 90 (2003), to age discrimination cases.

1. THIS COURT SHOULD RESOLVE THE PROPRIETY OF RIGID FORMULATIONS ADOPTED BY THE SIXTH CIRCUIT AND BY SOME OTHER CIRCUITS, UNDER WHICH, AS A MATTER OF LAW, A PLAINTIFF IS UNABLE TO MAKE OUT A PRIMA FACIE CASE OF AGE DISCRIMINATION IF HE HAS NOT BEEN REPLACED BY AN EMPLOYEE AT LEAST A FIXED NUMBER OF YEARS YOUNGER THAN THE PLAINTIFF.

In ***O'Connor v. Consolidated Coin Caterers Corp.***, 517 U.S. 308, 312, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996), this Court dealt with the question of whether it was necessary that the replacement worker in an age discrimination case be outside the protected class, that is, younger than 40. As noted by one federal District Court, while reasoning that "the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class," *id.* at 313, 116 S.Ct. 1307, the Supreme Court in ***O'Connor*** did not hold that replacement by a younger person

was an essential component of a *prima facie* age discrimination case. Instead, it found "the proper solution" to be that a plaintiff present "'evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion....' ***Grabosky v. Tammac Corp.***, 127 F.Supp.2d 610, 620 (M.D. Pa. 2000), citing ***O'Connor*** at 312, 116 S.Ct. 1307.

This recognition is in line with the Court's holding in ***Furnco Constr. Corp. v. Waters*** (1978), 438 U.S. 567, 577, 98 S.Ct. 2943, 57 L.Ed.2d 957, that the ***McDonnell Douglas*** framework was "never intended to be rigid, mechanized, or ritualistic." Requiring a terminated plaintiff to show replacement by a younger person in every case is a mechanistic and ritualistic approach that may serve to defeat otherwise meritorious claims. This is so because "[t]he replacement of a terminated plaintiff with an individual who shares the plaintiff's protected attribute does not necessarily negate the inference that the plaintiff was unlawfully discriminated against." ***Perry v. Woodward***, 199 F.3d 1126, 1138 (10th Cir.1999), cert. denied, 529 U.S. 1110, 120 S.Ct. 1964, 146 L.Ed.2d 796 (2000).

Other circuit courts have recognized this Court's eschewal of a rigid and ritualistic approach to age discrimination cases, but the Sixth Circuit has adopted an approach contrary to the words and spirit of ***O'Connor*** and ***Furnco***. In ***Grosjean v. First Energy Corp.***, 349 F.3d 332, the court concluded as a matter of law that "in the absence of direct evidence that the employer considered age to be significant, an age difference of six years or less between an

employee and a replacement is not significant." ***Grosjean*** at 340.

Other circuits have stated that under some circumstances, replacement by an insignificantly younger worker, or even an older worker, is not inconsistent with age-based motivation. After all, where a terminated older worker is replaced with another older worker from within the company, the company has still rid itself of one older worker. This does not mean, of course, that older workers can never be terminated, or that replacement by another older worker in and of itself gives rise to an inference of age discrimination; it only means that such replacement does not in and of itself negate the possibility of age discrimination. ***O'Connor*** did not hold that a showing of a significant age difference was the only way to establish a prima facie case, and did not address the question whether evidence that the employee was replaced by an older person, within the protected class would preclude any inference of age discrimination once the issue is submitted to the trier of fact.

As a California state court observed, it is one thing to say that evidence that an employee is replaced by a substantially younger person permits the inference that the termination was based upon age, but it "is quite another proposition to hold that evidence that an employee is replaced by an older person within the protected class precludes any inference that an employee is terminated based upon age, even if the Plaintiff presents other evidence to support an inference of discrimination." ***Begnal v. Canfield & Associates, Inc.***, 78 Cal.App.4th 66, 73-74, 92 Cal.Rptr.2d 611, 615-616 (Cal. App. 1 Dist. 2000).

As noted earlier, some circuits have refused to set arbitrary bars to relief in the form of fixed age differentials. For example, in ***Hoffmann v. Primedia Special Interest Publications***, 217 F.3d 522 (7th Cir. 2000), the Seventh Circuit Court of Appeals noted that "[t[here may be situations where a difference of less than ten years is substantial," and that "[i]n cases where the

disparity is less, the plaintiff still may present a triable claim if she directs the court to evidence that her employer considered her age to be significant." ***Hoffmann*** at 524-525, citing ***Hartley v. Wisconsin Bell, Inc.***, 124 F.3d 887, 893 (7th Cir.1997).

The Second Circuit has also recognized that failure to be replaced by a significantly younger person does not absolutely preclude the formation of a prima facie case:

> Replacement of a 60 year old by a 35 year old or even a 45 year old within the protected class would be more suggestive of discrimination than replacement of a 45 year old by a 42 year old within the protected class or by a 39 year old outside it. Replacement by someone older would suggest no age discrimination but would not disprove it conclusively.

Haskell v. Kaman Corp., 743 F.2d 113, 122 (2nd Cir. 1984).

In ***Loeb v. Textron, Inc.***, 600 F.2d 1003, 1013 (1st Cir. 1979), the court pointed out that "[r]eplacement by someone older would suggest no age discrimination but would not disprove it conclusively. The older replacement could have been hired, for example, to ward off a threatened discrimination suit."

The Tenth Circuit made a similar point in ***Greene v. Safeway Stores, Inc.***, 98 F.3d 554, 561 (10th Cir. 1996): "This judicial position ... makes sense in a situation where an older replacement is hired in an effort to make the defendant's employment practices look better to avert a threatened discrimination suit."

Similar statements can be found in ***Douglas v. Anderson***, 656 F.2d 528, 533 (C.A.Cal., 1981), and ***Hipp v. Liberty Nat. Life Ins. Co.***, 973 F.Supp. 1033, 1041 -1042 (M.D.Fla.1997), where the court held that replacement of the older worker with another worker 14 years his senior did not, by itself, preclude the terminated worker from presenting a *prima facie* case of age discrimination.

Thus the Sixth Circuit's rigid six-year rule is in conflict with the law of several other circuits.

Besides resolving a conflict between the circuits, this Court can inject an element of workplace reality missing from those circuits which have imposed rigid age differential requirements. While the Sixth Circuit's "six years or out" rule has the advantage of clarity, it fails to recognize exactly that which some other circuits have recognized: namely, that replacement of an older worker by a worker only slightly younger, or even older, than the terminated worker, still removes an older worker from the workforce and results in a younger workforce. Over time, as older workers are terminated, almost-as-old workers are moved up, and new, younger employees are brought in at the bottom, the employer may accomplish with patience that which would be easily recognizable as a discrimination were it to occur all at once. The problem is exacerbated when, as is often the case in industry, managers with hiring and firing authority change over relatively short periods of time. As is discussed below, that was the case with which Petitioner was confronted, in that much of the direct evidence of discrimination consisted of incidents which took place under the leadership of one business unit leader, but the culminating act took place under the leadership of her successor.

Because the Court of Appeals applied a rigid and mechanical standard in determining that Petitioner, as a matter of law, could not make out a *prima facie* case of age discrimination, contrary to the frequent admonition of this Court to avoid such rigidity, further review by this Court is warranted.

2. THIS COURT SHOULD RESOLVE UNCERTAINTY AMONG THE SEVERAL CIRCUITS AS TO WHETHER THE STANDARD FOR MAKING OUT A *PRIMA FACIE* CASE OF DISCRIMINATION IS A MATTER OF PROCEDURAL OR SUBSTANTIVE LAW UNDER THE *ERIE* DOCTRINE.

Before both the District Court and the Court of Appeals, Petitioner argued that the court should apply the standard for making out a *prima facie* case of discrimination as set forth by the Ohio Supreme Court in ***Mauzy v. Kelly Services, Inc.*** 7(1996), 5 Ohio St.3d 578, 664 N.E.2d 1272, 1273, which held that "a plaintiff may establish a *prima facie* case of age discrimination directly by presenting evidence, of any nature, to show that an employer more likely than not was motivated by discriminatory intent." Under this standard, evidence of any nature, direct or indirect, including circumstantial evidence, may be presented by the plaintiff to establish his *prima facie* case, and Petitioner would not have been required show that he was replaced by a significantly younger worker.

Both Petitioner and Respondent fully briefed the applicability of ***Mauzy*** to the case, Respondent arguing hat ***Mauzy*** would not apply in the federal courts because age discrimination analysis is procedural, rather than substantive, law. In spite of the fact that before both courts, the issue was extensively briefed by both Petitioner and Respondent, neither court even mentioned ***Mauzy***, but analyzed the case strictly under federal law.

The Court should review the Sixth Circuit's decision to analyze Petitioner's *prima facie* case under federal law rather than state law, because it appears that, with the possible exception of the Ninth Circuit, "[n]o circuit has squarely decided whether a state's application of an alternative to the ***McDonnell Douglas*** burden-shifting scheme is "procedural" or

"substantive" under the ***Erie*** doctrine." ***Snead v. Metropolitan Property & Cas. Ins. Co.***, 237 F.3d 1080, 1091 (9th Cir. 2001). Furthermore, those courts which have made an assumption in one direction or the other, have generally assumed it to be a substantive matter of state law: "Our sister circuits have assumed * * * that state law, not federal law, governs the burden-shifting standard applicable to cases in which the rule of decision is state rather than federal. These cases do not discuss the choice of law issue; they merely take for granted that the **McDonnell Douglas** standard is substantive for **Erie** purposes * * * ." ***Bourbon v. Kmart Corp.***, 223 F.3d 469, 474 (7th Cir. 2000), Posner concurring and citing numerous federal cases.

In ***Snead***, *supra*, the Ninth Circuit arguably has held that the ***McDonnell Douglas*** standard is procedural for ***Erie*** purposes. However, the choice before the Ninth Circuit, which very directly influenced its analysis, was not between ***McDonnell Douglas*** and an alternative state analog, but between ***McDonnell Douglas*** and a state summary judgment standard which required automatic denial of summary judgment once the plaintiff established a *prima facie* case. The court held that because the Oregon courts would then simply apply the ***McDonnell Douglas*** standard at trial, the outcome for any case that would be dismissed in federal court under the ***McDonnell Douglas*** standard, would result in a nonsuit or JNOV at the close of the plaintiff's case. The court also found that applying the state summary judgment standard instead of the ***McDonnell Douglas*** standard would impose an unreasonable burden on the federal courts.

Because the federal courts are split on the question of whether the ***McDonnell Douglas*** standard is substantive or procedural for ***Erie*** purposes, and because the Sixth Circuit in the instant case implicitly answered that question in a way that puts it at odds with most of the other circuits, further review by this Court is warranted.

3. THIS COURT SHOULD CORRECT THE SIXTH CIRCUIT'S REFUSAL TO CONSIDER PRIOR DISCRIMINATORY COMMENTS AND ACTIONS AS DIRECT EVIDENCE OF AGE DISCRIMINATION, WHERE THEY OCCURRED UNDER THE AEGIS OF DIFFERENT HIGHER MANAGEMENT, BUT WHERE THE RESPONSIBLE ACTORS WERE ALSO INVOLVED IN THE ADVERSE ACTION TAKEN AGAINST THE EMPLOYEE.

The Court of Appeals acknowledged that under ***Grosjean***, *supra*, while Petitioner was precluded from proving a *prima facie* case under the ***McDonnell Douglas*** test, direct evidence could still be used to prove a case of discrimination even in the absence of replacement by a substantially younger worker. Petitioner presented evidence that Clink and Panozzo made ageist comments and were involved in the decision-making process. The court held, however, that because many of the comments were made almost two years before Petitioner's discharge, the comments lacked sufficient connection to the discrimination alleged by Petitioner to be considered direct evidence. The court further held that because some of the references were not used in connection with Petitioner's discharge, and that no members of the targeted group were terminated, this evidence also was not direct evidence of discrimination against Petitioner.

The court rejected Petitioner's statistical evidence, which demonstrated a huge disparity between demotions of younger workers and demotions of older workers, on the basis that the demotions reflected in the study occurred under the previous business unit leader, rather than under the leader in charge at the time of Petitioner's termination.

As set forth in the factual background, while Patrick Gower was the formal decision maker, Alan Clink and Ken Panozzo had significant input into personnel decisions, including the

termination of Petitioner, and their tenure in these positions spanned the administrations of both Jean Johns and Patrick Gower. In light of these facts, of which the Court of Appeals was aware, the primary reason for the rejection of the statistical evidence, the fact that the demotions occurred under the administration of Jean Johns, places the Sixth Circuit at odds with other circuits that have addressed similar circumstances. For example, the Second Circuit has held that a plaintiff may establish direct evidence of employment discrimination through the statements or conduct of a person who lacks formal authority to hire or fire but who nonetheless influences an employment decision. ***Ostrowski v. Atlantic Mut. Ins. Cos.***, 968 F.2d 171, 182 (2d Cir.1992); ***Rose v. New York City Bd. of Educ.***, 257 F.3d 156, 162 (2d Cir.2001). In ***Walden v. Georgia-Pacific Corp.***, 126 F.3d 506, 514-15 (3d Cir.1997), the Third Circuit held that a person is in the decision-making process for ***Price Waterhouse*** purposes when he has direct access to the formal decision-maker and his discriminatory animus is linked to the formal decision-maker's specific decision to fire the Plaintiff. In ***Stacks v. Southwestern Bell Yellow Pages, Inc.***, 27 F.3d 1316, 1323 (8th Cir.1994), the court held that the discriminatory remarks of a manager, who was the fired plaintiff's supervisor and who was "closely involved in the decision-making process," constituted direct evidence under ***Price Waterhouse***. Similar holdings can be found in ***Bergene v. Salt River Project Agric. Improvement & Power Dist.***, 272 F.3d 1136, 1141 (9th Cir.2001) and in ***Griffin v. Washington Convention Center***, 142 F.3d 1308 (D.C. Cir. 1998).

As set forth in the factual background, Patrick Gower consulted with both Clink and Panozzo before terminating Petitioner. Similarly, Petitioner described an ongoing pattern of discrimination by Clink and Panozzo which spanned both the Johns and Gower administrations. In ignoring the close involvement of Clink and Panozzo in both Petitioner's termination and in the events that led up to his termination, the court set itself against several other circuit courts which have held that discriminatory actions of persons who influence formal decision makers may constitute direct evidence of discrimination.

Because the Court of Appeals' refusal to consider the discriminatory actions of persons who influenced the decision maker in this case was contrary to the holdings of several other circuit courts, further review by this Court is warranted.

4. THIS COURT SHOULD RESOLVE THE UNCERTAINTY AMONG THE COURTS OF APPEAL AS TO WHETHER THE MODIFICATION TO *PRICE WATERHOUSE* SET FORTH IN *DESERT PALACE, INC. V. COSTA*, 539 U.S. 90 (2003), APPLIES TO AGE DISCRIMINATION CASES.

Before both the District Court and the Court of Appeals, Appellant argued that he was entitled to have the evidence analyzed under both the ***McDonnell Douglas*** burden shifting test and the ***Price Waterhouse*** mixed-motive test as clarified or modified by ***Desert Palace, Inc. v. Costa***, 539 U.S. 90, 93, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003). Under ***Desert Palace***, a plaintiff need not offer direct evidence of discriminatory motive to proceed under a mixed-motive analysis.

The District Court held that ***Price Waterhouse*** simply did not apply to age discrimination cases. The Court of Appeals

recognized that ***Price Waterhouse*** applied to age discriminationcases (the court had already held to that effect in ***Gagne v. Northwestern Natl. Ins. Co.***, 881 F.2d 309 (6th Cir.1989)[2] and ***Manzer v. Diamond Shamrock Chemicals Co.***, 29 F.3d 1078, 1081 (6th Cir. 1994)). However, the court declined to decide whether ***Desert Palace*** applied, because it found that in any event there was not enough evidence, direct or indirect, that age was "a motivating factor" for Petitioner's termination. (In addition to rejecting Petitioner's direct evidence for the reasons discussed earlier, the court also held that Petitioner was reasonably terminated for safety violations. The court did not consider Petitioner's claim that the alleged safety violations were either nonexistent or pretextual).

While most courts that have considered the matter have held that ***Desert Palace*** applies to age discrimination cases, e.g., ***Rachid v. Jack In The Box, Inc.***, 376 F.3d 305, 311 (5th Cir. 2004), that position does not appear to be held by every circuit. As noted above, the Sixth Circuit declined to answer the question. One circuit court has assumed in dictum, without so holding, that ***Desert Palace*** does not apply to ADEA claims. ***Hill v. Lockheed Martin Logistics Mgmt., Inc.***, 354 F.3d 277, 284-85 n. 2 (4th Cir.2004). Other courts have, like the Sixth Circuit, specifically declined to decide the question. ***Trammel v. Simmons First Bank of Searcy***, 345 F.3d 611, 615 (8th Cir.2003). One district court, citing the District Court's decision in the instant case, has predicted that, until this Court decides

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2. Overruling on other grounds recognized by ***Kline v. Tennessee Valley Authority***, 128 F.3d 337, 75 Fair Empl. Prac. Cas. (BNA) 386, 73 Empl. Prac. Dec. P 45,300, 1997 Fed.App. 0304P (6th Cir.(Tenn.) Oct 15, 1997) (NO. 94-6355), rehearing and suggestion for rehearing *en banc* denied (Feb 11, 1998).

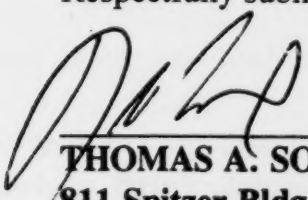
whether ***Desert Palace*** applies to age discrimination cases, the issue will be "a contentious one." ***Warren v. Terex Corp.***, 328 F.Supp.2d 641, 643 (N.D. Miss. 2004).

In light of the above differences among the circuits as to the applicability of ***Desert Palace*** to age discrimination cases, a determination by this Court that the lower courts erred in rejecting Petitioner's direct evidence, which necessarily will affect the analysis of the case under either ***McDonnell Douglas*** or ***Price Waterhouse***, should be accompanied by a determination as to whether ***Desert Palace*** is applicable to age discrimination cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX A

United States Court of Appeals, Sixth Circuit.
Samuel BOLANDER, Plaintiff-Appellant,
v.
BP OIL COMPANY, et al., Defendants-Appellees.
No. 03-4176.

Feb. 10, 2005.

Background: Former employee sued employer, alleging age discrimination under the Ohio age discrimination statute, retaliation under Title VII, and intentional infliction of emotional distress. The United States District Court for the Northern District of Ohio granted summary judgment in favor of the employer, and the employee appealed.

Holdings: The Court of Appeals held that:

(1) employee failed to prove age discrimination;
(2) employee failed to prove causation element of his retaliation claim; and
(3) there was no evidence of outrageous conduct on the part of the employer.

Affirmed.

On Appeal from the United States District Court for the Northern District of Ohio, Western Division.

Thomas A. Sobecki, Toledo, OH, for Plaintiff-Appellant.

Gregory T. Lodge, Shumaker, Loop & Kendrick, Toledo, OH, for Defendants-Appellees.

Before BOGGS, Chief Judge; GUY, Circuit Judge; and STEEH, District Judge. [FN1]

PER CURIAM.

*1 Plaintiff Samuel Bolander appeals from the district court's grant of summary judgment in favor of defendants BP Oil Company, et al. Bolander's complaint alleged claims of age discrimination, retaliation and intentional infliction of emotional distress. Because we hold that Bolander failed to state a prima facie case of discrimination, failed to produce evidence to support an inference of retaliation, and failed to show extreme and outrageous conduct by defendants to support his tort claim, we affirm.

I.

Samuel Bolander started working at the Toledo refinery operated by BP Oil Company ("BP") and its predecessor on August 28, 1973. Bolander became a supervisor in the maintenance department in 1976. Bolander worked his way up to various management and leadership roles in the maintenance department from 1976 until his discharge in 2002. At the time of his termination, Bolander was 51 years old.

In 1998, BP merged with Amoco. In November, 1999, Jeanne Johns became the Business Unit Leader ("BUL") and

Ken Panozzo became the maintenance department manager. Shortly thereafter, the personnel grading system was converted from BP grades to Amoco levels. Panozzo explained that Bolander's pay grade was reduced because the pay grade established for his position was not consistent with comparable maintenance supervisory positions. This change in pay grade did not result in a change of salary or job duties, but Bolander considered it a demotion. In March, 2000, Bolander's pay grade was reduced again following a substandard performance appraisal performed by Panozzo. This second pay grade reduction also did not result in a decrease in salary.

In the year 2000, most of the management positions were placed for bid in a process known as "T2K+". All affected jobs were declared open and employees were invited to bid on them. Jobs were available for bid in four different waves. In the second wave of the T2K+ process, Bolander bid on an "Asset Coordinator" position. His bid was not successful; thereafter Panozzo and Alan Clink encouraged him to bid in the next wave on a maintenance supervisor position. Bolander initially refused this invitation, considering it to be a demotion, but he ultimately bid on the position and received an offer in September, 2000. There was no reduction in Bolander's salary, which remained consistent until his termination.

In August, 2000, in the course of evaluating Bolander for the T2K+ job bid, it was discovered that Bolander failed to follow safety procedures on two occasions. Panozzo asked

Clink to investigate. Clink spoke to employees involved in the incidents, and to Bolander. During the investigation, Clink learned of a third safety incident that occurred in May, 2000. After concluding his investigation, Clink reviewed the information he obtained with Panozzo and Human Resources Specialist Marcene Jackson.

On October 4, 2000, Bolander received a disciplinary action which alleged that he had been guilty of three safety infractions in the past. The letter indicated that further safety violations would result in additional disciplinary consequences, up to and including termination.

*2 In December 2000, Bolander filed a charge of age discrimination with the Ohio Civil Rights Commission ("OCRC"). The charge challenged the denial of the Asset Coordinator job bid that had occurred the previous summer during the second wave of the T2K+ process. The charge alleged Bolander did not receive the job because of his age. The OCRC investigated, and ultimately dismissed Bolander's charge. The OCRC noted that Bolander's 1999 performance appraisal was "less favorable" than those of the successful candidates, and that "four of the seven successful candidates [for the asset coordinator positions] were members of [the] protected group." Bolander requested reconsideration of this finding, and on November 29, 2001, the OCRC upheld its original decision.

In November, 2001, Pat Gower replaced Jeanne Johns as BUL. Gower is two years younger than Bolander. Bolander

does not believe Gower ever made any derogatory remarks to plaintiff about his age. Significantly, Gower considered job safety to be one of his highest priorities as BUL.

On April 1, 2002, without a "hole watch" (fellow worker observing him), Bolander placed his head and one shoulder across the plane of a confined space to observe whether the vessel had been cleaned. This action violated safety rules and was observed by three employees of an on-site contractor (the "Washington Group"). One of the three individuals was Corie Spurgeon, the Safety Specialist for the Washington Group. According to Spurgeon, Bolander was inside the confined space for about two minutes without a hole watch present.

An investigation took place over the next several days. Human Resources Specialist Jackson, Panozzo, and another supervisor interviewed several people, including Spurgeon and Bolander. After the investigation concluded, Jackson informed the refinery's Human Resources Manager, Bill Christensen, of the results. Christensen informed Gower of the status of the matter. Gower discussed the matter with several senior managers, including Panozzo and Clink, and concluded that Bolander should be terminated. Gower instructed Christensen and Panozzo to meet with Bolander to advise him of his termination. Panozzo had several "talking points" prepared to explain to Bolander that he was being terminated for safety violations.

In support of his motion for summary judgment, Bolander submitted testimony from several employees to the effect that

it was common practice, for various reasons, to cross the plane of a confined space without a hole watch present. Robert Sauer, a refinery safety adviser employed by plaintiff for 25 years, testified that prior to Bolander's termination, it was an accepted and common practice at the refinery to look inside permitted confined spaces without an attendant present. Thomas Moroni worked at the refinery from November 1990 until July 2000. He testified it was normal practice for managers to break a fully permitted confined space without a hole watch present. He stated that he did it himself as recently as 1999. Jonathan Parker was an employee in the Health, Safety and Environmental Department at the refinery from November 1988 until March 1998. He testified that the revised confined space entry procedure did not prohibit qualified persons such as supervisors from briefly breaking the plane of the permitted confined space, without a hole watch present, to make a brief visual inspection.

*3 As evidence of age-based animus, Robert Sauer testified that Alan Clink and Ken Panozzo repeatedly referred to certain people as the "old guard" beginning shortly after Panozzo, Pat Ward, and Johns were named to the reconstituted senior team. The term was targeted at influential employees who had been there for 20-plus years. Also, Panozzo often talked about seeking "young, energetic engineers" for positions. On at least one occasion, Panozzo made such a comment with regard to the position of "Asset Coordinator." Thomas Moroni testified by affidavit that from time to time Panozzo would consult with him concerning various personnel issues in the maintenance department. On

several occasions Panozzo referred to Bolander as being part of the "old guard." On several occasions Panozzo told Moroni that there was a "younger and more dynamic way of doing things" at the Toledo refinery. Panozzo also told Moroni that he liked some of the younger engineers at the Toledo refinery because they were "younger and energetic."

After Bolander's termination, David Murray temporarily assumed his position. Murray was 59 years old. On May 2, 2002, Dan Waterfield was selected to fill the position on a permanent basis. Waterfield was 49 years old. Waterfield still holds the position.

II.

We review the district court's grant of summary judgment de novo. Watkins v. City of Battle Creek, 273 F.3d 682, 685 (6th Cir.2001).

Age discrimination cases under the ADEA are analyzed under the same framework as employment discrimination cases under Title VII. Grosjean v. First Energy Corp., 349 F.3d 332, 335 (6th Cir.2003). Bolander's claim in this case arises under the Ohio age discrimination statute, which parallels the ADEA analysis. Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 357 (6th Cir.1998). In the absence of direct evidence of age-based animus, a plaintiff establishes a prima facie case of age discrimination by showing (1) he is a member of the protected group, (2) he was subject to an adverse employment decision, (3) he was qualified for the position, and (4) he was replaced by a person

outside the protected class. Id. "In age discrimination cases, the protected class includes all workers at least 40 years old and the fourth element is modified to require replacement not by a person outside the protected class, but merely replacement by a significantly younger person." Id. (citing Kline v. TVA, 128 F.3d 337, 342 (6th Cir.1997)).

[1] Our recent decision in Grosjean involved age discrimination claims under federal and Ohio law. The Sixth Circuit upheld summary judgment on the grounds that the plaintiff failed to establish a "prima facie case of age discrimination because he was not replaced by a person significantly younger than himself." Grosjean, 349 F.3d at 334. "[T]he prima facie case requires evidence adequate to create an inference that an employment decision was based on an illegal discriminatory criterion." O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 312, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996). This "inference cannot be drawn from the replacement of one worker with another worker insignificantly younger." Id. at 313. In Grosjean, we conducted a review of precedent from other circuits, and concluded that replacement by an employee who is within six years of the plaintiff's age would be insufficient to establish a prima facie case of age discrimination.

*4 Given this array of authority, and our circuit's precedent, we hold that, in the absence of direct evidence that the employer considered age to be significant, an age difference of six years or less between an employee and a replacement is not significant.

Grosjean, 349 F.3d at 339. Bolander was initially replaced by an employee 8 years his senior, and ultimately by an employee 2 years his junior. Therefore, plaintiff cannot make out a prima facie case under McDonnell Douglas.

[2] Bolander urges the court to modify the holding in Grosjean to reflect that under unusual circumstances, replacement by an insignificantly younger worker, or even an older worker, is not inconsistent with age-based motivation. For the reasons articulated in that case, we decline to do so. Id. at 337-40. Grosjean provides, however, that direct evidence may still be used to prove a case of discrimination even in the absence of replacement by a substantially younger worker. Id. at 340.

"Direct evidence" of discrimination is "that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's action." Jacklyn v. Schering-Plough Health Care Prods. Sales Corp., 176 F.3d 921, 926 (6th Cir.1999). Allegedly discriminatory remarks made by somebody other than the decisionmaker, or statements that are "unrelated to the decisional process" at issue, do not constitute "direct evidence." Bush v. Dictaphone Corp., 161 F.3d 363, 369 (6th Cir.1998).

Bolander does not produce any evidence that Pat Gower considered age to be a significant factor in making the determination to terminate. Rather, Bolander presents evidence that Clink and Panozzo made ageist comments and

were involved in the decisionmaking process. Panozzo allegedly made the remark that he was looking for "young energetic engineers" in connection with the filling of the Asset Coordinator position in the summer of 2000, almost two years before Bolander's discharge. This comment lacks sufficient connection to the discrimination alleged by Bolander to be considered direct evidence. Id. The "old guard" references were targeted at long-term employees who were resistant to changes being implemented by BUL Johns in 2000 and 2001. There is no evidence the term was used in connection with Bolander's discharge or that other members of this group were terminated.

Bolander also submitted statistical evidence to support his claim of age discrimination. A statistical analysis of demotions and salary of Toledo refinery employees by age was conducted by Dr. Malcolm S. Cohen, Ph.D. Dr. Cohen compared employees under age 40 to those age 40 and over with regard to demotions in 2000 and salary increases for years 2000 and 2001. The report shows that in the year 2000, 25 of 129 employees over 40 were demoted as compared to none of the 36 employees under age 40. Dr. Cohen found there are only 3 chances out of 1000 that all 25 of the demotions would be among persons over age 40.

*5 Personnel changes that occurred in 2000 would have been under the previous BUL, Jeanne Johns, and not Pat Gower. There is sufficient evidence to conclude that these statistics reflect the T2K+ process in which most management positions became open to a bidding process in 2000. A

reasonable explanation for why the younger employees were not demoted is that they were largely limited to lower level positions. Moreover, the evidence concerns the bid process of 2000, not the termination decision in 2002. For these reasons, the affidavit from the statistician is not direct evidence of discrimination against plaintiff in 2002.

Bolander also relies on the affidavit of Earl Gilbert and the deposition of James Thomas, both of whom were plaintiff's co-workers. They each testify to the effect that younger people received promotions during the T2K+ bidding process in 2000. To consider this testimony relevant to Bolander's termination in 2002, however, one must make multiple inferences and, therefore, the evidence cannot be considered direct. See Manzer v. Diamond Shamrock Chems. Co., 29 F.3d 1078, 1081 (6th Cir.1994). As with the statistical evidence, this testimony bears only a strained relationship to Bolander's termination if at all. It deals with employment decisions of a different caliber made by a different supervisor two years before plaintiff was terminated.

Bolander lacks direct evidence of discrimination and therefore must resort to the McDonnell Douglas approach to state a prima facie case of discrimination. Bolander has not shown that he was replaced by a significantly younger worker where his replacement was only two years younger. Therefore, Bolander's attempt to show age-discrimination under McDonnell Douglas fails.

III.

[3] Bolander argued before the district court that he was entitled to have the evidence analyzed under the mixed-motive burden-shifting method articulated in Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), and modified by Desert Palace, Inc. v. Costa, 539 U.S. 90, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003). If Desert Palace applies to age discrimination cases, a plaintiff could state a prima facie case by using circumstantial evidence to show that he was terminated at least in part due to his age. See 539 U.S. at 101. In this case, however, there is not enough evidence, direct or indirect, that age was "a motivating factor" for Bolander's termination. Ibid. (quoting 42 U.S.C. § 2000e-2(m)).

First, there is strong evidence that safety was of paramount importance, especially after Pat Gower took over as BUL in November, 2001. BP's policy requiring use of the buddy system was an important part of the confined space safety policy, of which Bolander was aware. Bolander's alleged violation of the confined space policy was witnessed by a group of independent contractors, who raised the violation to their safety director, who also witnessed the violation. During BP's investigation, Bolander admitted to committing the violation. Finally, Bolander received a safety violation warning in the past, and was on notice of how BP would respond to any future violations.

*6 As is more fully articulated in the proceeding section, there is little evidence that age played a role in the decision to terminate Bolander. Panozzo's alleged ageist comments had

no connection to Bolander's termination. Gower was approximately the same age as Bolander and he is not accused of making any ageist remarks or having any age-based animus toward Bolander. Plaintiff's statistics, affidavit, and deposition evidence concern another set of employment decisions made by a different supervisor two years before plaintiff was terminated. The same can be said about plaintiff's third-party affidavit and deposition testimony. There is no evidence to create an issue of fact whether age was a motivating factor in BP's decision to terminate Bolander. This is not a mixed-motives case; therefore the applicability of Desert Palace is not an issue and we do not reach it.

IV.

[4] Bolander's fourth assignment of error deals with the district court's dismissal of his retaliation claim. Bolander filed a charge of discrimination with the Ohio Civil Rights Commission in December 2000. The charge was dismissed 12 months later, with the OCRC finding no probable cause to believe there was any discrimination based on age. Bolander alleges in his complaint he was discharged in April 2002 in retaliation for the filing of the OCRC charge in 2000.

A prima facie case for retaliation requires a showing that: (1) the plaintiff engaged in activity protected by Title VII or the state civil rights act; (2) the exercise of protected rights was known to the defendant; (3) the defendant thereafter took adverse employment action against the plaintiff; and (4) there was a causal connection between the protected activity and the

adverse employment action. Morris v. Oldham County Fiscal Court, 201 F.3d 784, 792 (6th Cir.2000).

It is the fourth element, requiring a causal connection between Bolander's filing of the OCRC charge and his discharge, that is at issue in this appeal. Seventeen months passed between the two events in this case, and the district court held that a "seventeen month hiatus between the filing of the charge and plaintiff's firing is to[o] long to raise an inference of retaliatory animus." The district court cited to this court's case of Cooper v. City of North Olmsted, 795 F.2d 1265, 1272 (6th Cir.1986) (four-month interval insufficient to support inference of retaliatory motive).

In order to prove his claim, Bolander was required to produce some additional evidence to demonstrate a causal connection between the protected activity and adverse employment action. Bolander argues that he was unfairly singled out for the safety violation, when the alleged safety violation was conduct routinely taken by other similarly situated persons, and was arguably not a safety violation at all. BP points out that the April 1 safety violation was brought to its attention by the safety manager of another company. In addition, Bolander had already received a written warning for placing his judgment above the requirements of safety policies, a warning that preceded the filing of the OCRC charge.

*7 The passage of 17 months between the filing of the OCRC charge and Bolander's termination does not allow any

inference of causal connection, and Bolander has produced no evidence of any connection between the protected activity and the termination of employment. The district court did not err in granting summary judgment to BP Oil on Bolander's retaliation claim.

V.

[5] Bolander contends that the district court improperly dismissed his intentional infliction of emotional distress claim. Under Ohio law, a plaintiff must demonstrate that: (1) the defendant intended to cause emotional distress, or knew or should have known that his conduct would result in serious emotional distress to the plaintiff; (2) the defendant's conduct was outrageous and extreme beyond all bounds of decency and subsequently can be characterized as utterly intolerable in a civilized community; (3) the defendant's conduct was the proximate cause of plaintiff's psychic injuries; and (4) the plaintiff's emotional distress was serious, and of such a nature that no reasonable person could be expected to endure it. Ekunsumi v. Cincinnati Restoration, Inc., 120 Ohio App.3d 557, 561, 698 N.E.2d 503 (Ohio Ct.App.1997); see generally Yaeger v. Local Union 20, 6 Ohio St.3d 369, 375, 453 N.E.2d 666 (1983). "To say that Ohio courts narrowly define 'extreme and outrageous conduct' would be something of an understatement." Baab v. AMR Services Corp., 811 F.Supp. 1246, 1269 (N.D.Ohio 1993).

This court has held that "an employee's termination, even if based upon discrimination, does not rise to the level of 'extreme and outrageous conduct' without proof of something

more. If such were not true, then every discrimination claim would simultaneously be a cause of action for intentional infliction of emotional distress." Godfredson v. Hess & Clark, Inc., 173 F.3d 365, 376 (6th Cir.1999). In this case there is no evidence of outrageous conduct on the part of defendant. The district court properly dismissed this claim. For these reasons, we AFFIRM the judgment of the district court.

FN1. The Honorable George Caram Steeh, United States District Court for the Eastern District of Michigan, sitting by designation.

United States District Court,
N.D. Ohio, Western Division.
Samuel L. BOLANDER, Plaintiff
v.
BP OIL COMPANY, et al.,, Defendant
No. 3:02CV7341.

Aug. 6, 2003.

represented by Thomas A. Sobecki, Toledo, OH, Lead Attorney, Attorney to be Noticed, for Samuel Bolander, Plaintiff.

represented by Gregory T. Lodge, Shumaker, Loop & Kendrick, Toledo, OH, Lead Attorney, Attorney to be Noticed, for BP Oil Company, Defendant.

represented by Gregory T. Lodge, (See above for address), Lead Attorney, Attorney to be Noticed, for BP Products North America Inc., Defendant.

represented by Gregory T. Lodge, (See above for address), Lead Attorney, Attorney to be Noticed, for BP Retirement Accumulation Plan, Defendant.

ORDER

CARR, J.

*1 This is an employment discrimination case brought under Ohio's equivalent to the federal age discrimination in

employment statute, O.R.C. § 4112.02 and § 4112.09 Plaintiff's complaint also includes claims under ERISA (which he has withdrawn) and a state-law claim for intentional infliction of emotional distress.

Pending is defendants' motion for summary judgment. For the reasons that follow, the motion shall be granted.

Plaintiff began work at the defendant's refinery in 1973. Plaintiff was promoted to a management position in the maintenance department, and occupied such position at the time of his termination in 2002. He was responsible for complying with safety policies and regulations, and setting an example of such compliance for other workers.

There is no question that plaintiff was a capable and well-regarded employee. Nonetheless, due to a safety infraction on April 1, 2002, that was observed by personnel employed by a subcontractor, and called by one of those individuals to the attention of defendant's management, plaintiff was fired.

Plaintiff claims that his termination was due to his age and, as well, in retaliation for a OCRC complaint that the plaintiff had filed seventeen months earlier, in December, 2000. In that charge, plaintiff complained that his failure to receive a promotion was due to age. He did not contend that a warning letter that he had previously received about safety infractions had anything to do with his age.

On November 8, 2001, the OCRC issued notice that it found no violation. This case does not involve that complaint, except

to the extent that plaintiff claims his April, 2002, termination was, in part at least, in retaliation for his original OCRC complaint.

After the company fired the plaintiff, it filled his position temporarily with an individual who was older than he. The permanent replacement was two years younger than the plaintiff.

Plaintiff contends that a couple of years before his termination the plant administration had begun a program of terminating older employees, and that, as part of that program, he had been demoted. That demotion had not, however, been accompanied by a reduction in salary.

Plaintiff's statistical expert has provided an opinion, based on the fact that the twenty-five demotions during that period, all of which were of employees over forty years of age, that there are only three chances out of a thousand that all the demotions would be of persons over forty.

Plaintiff also has provided evidence that in the past safety infractions of the kind he acknowledged committing on April 1, 2002, had been committed by other workers, including supervisors, without a disciplinary response from the company. A different plant manager was, however, running the company at the time of plaintiff's termination.

With regard to plaintiff's initial warning letter, which related to past infractions, the plaintiff has provided evidence that he was told by a supervisor that if he had taken a different job,

which had been offered to him, he would not have received the warning letter. The company has shown, however, that an intervening application by the plaintiff for a promotion had led to the evaluation of his safety record, which, in turn, led to the warning letter.

*2 In other words, the statement that he would not have received the letter had he taken the first job offered to him was correct: he would have been in that job, and not subject to review, at the time he applied for the later opening. Without the later review, the letter would not have been sent.

Discussion

Defendant contends that plaintiff cannot establish a prima facie case, and that, in any event, plaintiff cannot meet his burden of proving that the company's legitimate articulated reason was pretextual. I agree.

In O'Connor v. Coin Catering Corp., 517 U.S. 308, 313 (1996), the Supreme Court held that an inference of age discrimination cannot be drawn from the replacement of one worker with another "insignificantly younger" worker. In Bush v. Dictaphone Corp., 161 F.3d 363, 368 (6th Cir.1998), the Sixth Circuit held that plaintiff's replacement, who was about five years younger than the plaintiff, was not "substantially younger" than the plaintiff.

Here the age differential was about two years. Other courts have held that such a narrow difference does not satisfy the "substantially younger" criterion.. Narin v. Lower Merion Sch. Dist., 206 F.3d 323, 333 n. 9 (3d Cir.2000) (seven year and two

year differentials between replacements and plaintiff not substantial); Grogan v. Savings of America, Inc., 118 F.Supp.2d 741, 755 (S.D.Tex.1999) (two year differential not substantial); Roberts v. Sears, Roebuck & Co., 2000 WL 33422750, *5 n. 1 (W.D.N .C.) (same); Quintiliani v. Massachusetts Bay Transp. Auth., 2000 WL 1801841, *4 (D.Mass.) (suggesting that age differences of two and twelve years were insignificant to establish an inference of age discrimination). These decisions, especially in light of Bush and its holding that a five year differential did not establish an inference of age discrimination, justify granting defendants' motion for summary judgment as to his age discrimination claim.

In any event, I agree with the defendant that it has articulated a legitimate reason--plaintiff's noncompliance with an important safety regulation--that plaintiff has not shown is pretextual. In seeking to meet this burden, plaintiff has produced some evidence that other employees committing similar infractions had not been disciplined in the past.

That may well be so, but it does not matter. The prior incidents occurred under a different plant manager. With a change in regimes can come a change in policy. This is especially true at a refinery, where the risk of injury--to the plant, its workers and others, and the environment--is omnipresent. Safety infractions that may have been disregarded, or not merited the severe sanction of dismissal, can properly be viewed by a different manager as more serious, and as needing a firm response.

Plaintiff has not shown that the manager who terminated him failed to discipline other employees who violated the regulation

he admitted having disregarded. He cannot, accordingly, show that similarly situated employees were treated differently than he. Mitchell v. Toledo Hospital, 964 F.2d 577, 583 (6th Cir.1992).

*3 To the extent that plaintiff contends that the conventional four-factor prima facie case should not be used in this case, I disagree. His reliance on "mixed motives" and Desert Palace, Inc. v. Costa, 539 U.S. 90, 123 S.Ct. 2148 (2003), cannot prevail. As defendants' reply brief points out, the mixed motives rationale and Desert Palace do not apply to age discrimination cases.

I agree with the defendants that they are entitled to prevail on plaintiff's other two claims. Part of plaintiff's prima facie showing as to his claim of retaliation is that there was a causal connection between his filing of the OCRC complaint and his termination. Morris v. Oldham County Fiscal Court, 201 F.3d 784, 792 (6th Cir.2000); Canitia v. Yellow Freight Sys., Inc., 903 F .2d 1064, 1066 (6th Cir.1990). The seventeen-month hiatus between the filing of the charge and plaintiff's firing is to long to raise an inference of retaliatory animus. Cooper v. City of North Olmsted, 795 F.2d 1265, 1272 (6th Cir.1986) (four--month interval insufficient to support inference of retaliatory motive). Absent any other proof of a nexus between his OCRC complaint and the loss of his job, plaintiff cannot prevail on this claim.

Defendants are also entitled to summary judgment on plaintiffs' claim of intentional infliction of emotional distress. Though, without a doubt, losing one's job after nearly thirty

years is a traumatic and deeply upsetting event, the resulting distress, no matter how severe, is, without more, not enough to sustain a claim of intentional infliction of emotional distress.

To state a cause of action for intentional infliction of emotional distress in Ohio, a plaintiff must show:

1. The defendant intended to cause emotional distress, or knew or should have known that his conduct would result in serious emotional distress to the plaintiff;
2. The defendant's conduct was outrageous and extreme beyond all bounds of decency and subsequently can be characterized as utterly intolerable in a civilized community;
3. The defendant's conduct was the proximate cause of plaintiff's psychic injuries; and

4. the plaintiff's emotional distress was serious, and of such a nature that no reasonable person could be expected to endure it.

Ekunsumi v. Cincinnati Restoration, Inc., 120 Ohio App.3d 557, 561 (1997). See generally, Yeager v. Local Union 20, 6 Ohio St.3d 369, 375 (1983).

Firing an employee--even one of such long-standing service as the plaintiff-- from a refinery for violation of a safety regulation designed to protect his welfare and that of his fellow workers and others hardly constitutes conduct that was "outrageous" or "utterly intolerable in a civilized society." Plaintiff cannot make out a prima facie claim of intentional infliction of emotional distress.

Conclusion

In light of the foregoing, it is

ORDERED THAT defendants' motion for summary judgment be, and the same hereby is granted.

*4 So ordered.

/s/ James G. Carr
James G. Carr
United States District Judge

APPENDIX C

Baldwin's Ohio Revised Code Annotated
Title XLI. Labor and Industry
Chapter 4112. Civil Rights Commission
General Provisions

4112.02 Unlawful discriminatory practices

It shall be an unlawful discriminatory practice:

(A) For any employer, because of the race, color, religion, sex, national origin, disability, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

(B) For an employment agency or personnel placement service, because of race, color, religion, sex, national origin, disability, age, or ancestry, to do any of the following:

(1) Refuse or fail to accept, register, classify properly, or refer for employment, or otherwise discriminate against any person;

(2) Comply with a request from an employer for referral of applicants for employment if the request directly or indirectly indicates that the employer fails to comply with the provisions of sections 4112.01 to 4112.07 of the Revised Code.

(C) For any labor organization to do any of the following:

(1) Limit or classify its membership on the basis of race, color, religion, sex, national origin, disability, age, or ancestry;

(2) Discriminate against, limit the employment opportunities of, or otherwise adversely affect the employment status, wages, hours, or employment conditions of any person as an employee because of race, color, religion, sex, national origin, disability, age, or ancestry.

(D) For any employer, labor organization, or joint labor-management committee controlling apprentice training programs to discriminate against any person because of race, color, religion, sex, national origin, disability, or ancestry in admission to, or employment in, any program established to provide apprentice training.

(E) Except where based on a bona fide occupational qualification certified in advance by the commission, for any employer, employment agency, personnel placement service, or labor organization, prior to employment or admission to membership, to do any of the following:

(1) Elicit or attempt to elicit any information concerning the race, color, religion, sex, national origin, disability, age, or ancestry of an applicant for employment or membership;

(2) Make or keep a record of the race, color, religion, sex, national origin, disability, age, or ancestry of any applicant for employment or membership;

(3) Use any form of application for employment, or personnel or membership blank, seeking to elicit information regarding race, color, religion, sex, national origin, disability, age, or ancestry; but an employer holding a contract containing a nondiscrimination clause with the government of the United States, or any department or agency of that government, may require an employee or applicant for employment to furnish documentary proof of United States citizenship and may retain that proof in the employer's personnel records and may use photographic or fingerprint identification for security purposes;

(4) Print or publish or cause to be printed or published any notice or advertisement relating to employment or membership indicating any preference, limitation, specification, or discrimination, based upon race, color, religion, sex, national origin, disability, age, or ancestry;

(5) Announce or follow a policy of denying or limiting, through a quota system or otherwise, employment or membership opportunities of any group because of the race, color, religion, sex, national origin, disability, age, or ancestry of that group;

(6) Utilize in the recruitment or hiring of persons any employment agency, personnel placement service, training school or center, labor organization, or any other employee-referring source known to discriminate against persons because of their race, color, religion, sex, national origin, disability, age, or ancestry.

(F) For any person seeking employment to publish or cause to be published any advertisement that specifies or in any manner

indicates that person's race, color, religion, sex, national origin, disability, age, or ancestry, or expresses a limitation or preference as to the race, color, religion, sex, national origin, disability, age, or ancestry of any prospective employer.

(G) For any proprietor or any employee, keeper, or manager of a place of public accommodation to deny to any person, except for reasons applicable alike to all persons regardless of race, color, religion, sex, national origin, disability, age, or ancestry, the full enjoyment of the accommodations, advantages, facilities, or privileges of the place of public accommodation.

(H) For any person to do any of the following:

(1) Refuse to sell, transfer, assign, rent, lease, sublease, or finance housing accommodations, refuse to negotiate for the sale or rental of housing accommodations, or otherwise deny or make unavailable housing accommodations because of race, color, religion, sex, familial status, ancestry, disability, or national origin;

(2) Represent to any person that housing accommodations are not available for inspection, sale, or rental, when in fact they are available, because of race, color, religion, sex, familial status, ancestry, disability, or national origin;

(3) Discriminate against any person in the making or purchasing of loans or the provision of other financial assistance for the acquisition, construction, rehabilitation, repair, or maintenance of housing accommodations, or any person in the making or purchasing of loans or the provision of other financial

assistance that is secured by residential real estate, because of race, color, religion, sex, familial status, ancestry, disability, or national origin or because of the racial composition of the neighborhood in which the housing accommodations are located, provided that the person, whether an individual, corporation, or association of any type, lends money as one of the principal aspects or incident to the person's principal business and not only as a part of the purchase price of an owner-occupied residence the person is selling nor merely casually or occasionally to a relative or friend;

(4) Discriminate against any person in the terms or conditions of selling, transferring, assigning, renting, leasing, or subleasing any housing accommodations or in furnishing facilities, services, or privileges in connection with the ownership, occupancy, or use of any housing accommodations, including the sale of fire, extended coverage, or homeowners insurance, because of race, color, religion, sex, familial status, ancestry, disability, or national origin or because of the racial composition of the neighborhood in which the housing accommodations are located;

(5) Discriminate against any person in the terms or conditions of any loan of money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing accommodations because of race, color, religion, sex, familial status, ancestry, disability, or national origin or because of the racial composition of the neighborhood in which the housing accommodations are located;

(6) Refuse to consider without prejudice the combined income of both husband and wife for the purpose of extending mortgage credit to a married couple or either member of a married couple;

(7) Print, publish, or circulate any statement or advertisement, or make or cause to be made any statement or advertisement, relating to the sale, transfer, assignment, rental, lease, sublease, or acquisition of any housing accommodations, or relating to the loan of money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing accommodations, that indicates any preference, limitation, specification, or discrimination based upon race, color, religion, sex, familial status, ancestry, disability, or national origin, or an intention to make any such preference, limitation, specification, or discrimination;

(8) Except as otherwise provided in division (H)(8) or (17) of this section, make any inquiry, elicit any information, make or keep any record, or use any form of application containing questions or entries concerning race, color, religion, sex, familial status, ancestry, disability, or national origin in connection with the sale or lease of any housing accommodations or the loan of any money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing accommodations. Any person may make inquiries, and make and keep records, concerning race, color, religion, sex, familial status, ancestry, disability, or national origin for the purpose of monitoring compliance with this chapter.

(9) Include in any transfer, rental, or lease of housing accommodations any restrictive covenant, or honor or exercise, or attempt to honor or exercise, any restrictive covenant;

(10) Induce or solicit, or attempt to induce or solicit, a housing accommodations listing, sale, or transaction by representing that a change has occurred or may occur with respect to the racial, religious, sexual, familial status, or ethnic composition of the block, neighborhood, or other area in which the housing accommodations are located, or induce or solicit, or attempt to induce or solicit, a housing accommodations listing, sale, or transaction by representing that the presence or anticipated presence of persons of any race, color, religion, sex, familial status, ancestry, disability, or national origin, in the block, neighborhood, or other area will or may have results including, but not limited to, the following:

(a) The lowering of property values;

(b) A change in the racial, religious, sexual, familial status, or ethnic composition of the block, neighborhood, or other area;

(c) An increase in criminal or antisocial behavior in the block, neighborhood, or other area;

(d) A decline in the quality of the schools serving the block, neighborhood, or other area.

(11) Deny any person access to or membership or participation in any multiple-listing service, real estate brokers' organization, or other service, organization, or facility relating to the business of selling or renting housing accommodations, or discriminate against any person in the terms or conditions of that access, membership, or participation, on account of race, color, religion, sex, familial status, national origin, disability, or ancestry;

(12) Coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of that person's having exercised or enjoyed or having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by division (H) of this section;

(13) Discourage or attempt to discourage the purchase by a prospective purchaser of housing accommodations, by representing that any block, neighborhood, or other area has undergone or might undergo a change with respect to its religious, racial, sexual, familial status, or ethnic composition;

(14) Refuse to sell, transfer, assign, rent, lease, sublease, or finance, or otherwise deny or withhold, a burial lot from any person because of the race, color, sex, familial status, age, ancestry, disability, or national origin of any prospective owner or user of the lot;

(15) Discriminate in the sale or rental of, or otherwise make unavailable or deny, housing accommodations to any buyer or renter because of a disability of any of the following:

(a) The buyer or renter;

(b) A person residing in or intending to reside in the housing accommodations after they are sold, rented, or made available;

(c) Any individual associated with the person described in division (H)(15)(b) of this section.

(16) Discriminate in the terms, conditions, or privileges of the sale or rental of housing accommodations to any person or in the provision of services or facilities to any person in connection with the housing accommodations because of a disability of any of the following:

(a) That person;

(b) A person residing in or intending to reside in the housing accommodations after they are sold, rented, or made available;

(c) Any individual associated with the person described in division (H)(16)(b) of this section.

(17) Except as otherwise provided in division (H)(17) of this section, make an inquiry to determine whether an applicant for the sale or rental of housing accommodations, a person residing in or intending to reside in the housing accommodations after they are sold, rented, or made available, or any individual associated with that person has a disability, or make an inquiry to determine the nature or severity of a disability of the applicant or such a person or individual. The following inquiries may be made of all applicants for the sale or rental of

housing accommodations, regardless of whether they have disabilities:

(a) An inquiry into an applicant's ability to meet the requirements of ownership or tenancy;

(b) An inquiry to determine whether an applicant is qualified for housing accommodations available only to persons with disabilities or persons with a particular type of disability;

(c) An inquiry to determine whether an applicant is qualified for a priority available to persons with disabilities or persons with a particular type of disability;

(d) An inquiry to determine whether an applicant currently uses a controlled substance in violation of section 2925.11 of the Revised Code or a substantively comparable municipal ordinance;

(e) An inquiry to determine whether an applicant at any time has been convicted of or pleaded guilty to any offense, an element of which is the illegal sale, offer to sell, cultivation, manufacture, other production, shipment, transportation, delivery, or other distribution of a controlled substance.

(18)(a) Refuse to permit, at the expense of a person with a disability, reasonable modifications of existing housing accommodations that are occupied or to be occupied by the person with a disability, if the modifications may be necessary to afford the person with a disability full enjoyment of the housing accommodations. This division does not preclude a

landlord of housing accommodations that are rented or to be rented to a disabled tenant from conditioning permission for a proposed modification upon the disabled tenant's doing one or more of the following:

(i) Providing a reasonable description of the proposed modification and reasonable assurances that the proposed modification will be made in a workerlike manner and that any required building permits will be obtained prior to the commencement of the proposed modification;

(ii) Agreeing to restore at the end of the tenancy the interior of the housing accommodations to the condition they were in prior to the proposed modification, but subject to reasonable wear and tear during the period of occupancy, if it is reasonable for the landlord to condition permission for the proposed modification upon the agreement;

(iii) Paying into an interest-bearing escrow account that is in the landlord's name, over a reasonable period of time, a reasonable amount of money not to exceed the projected costs at the end of the tenancy of the restoration of the interior of the housing accommodations to the condition they were in prior to the proposed modification, but subject to reasonable wear and tear during the period of occupancy, if the landlord finds the account reasonably necessary to ensure the availability of funds for the restoration work. The interest earned in connection with an escrow account described in this division shall accrue to the benefit of the disabled tenant who makes payments into the account.

(b) A landlord shall not condition permission for a proposed modification upon a disabled tenant's payment of a security deposit that exceeds the customarily required security deposit of all tenants of the particular housing accommodations.

(19) Refuse to make reasonable accommodations in rules, policies, practices, or services when necessary to afford a person with a disability equal opportunity to use and enjoy a dwelling unit, including associated public and common use areas;

(20) Fail to comply with the standards and rules adopted under division (A) of section 3781.111 of the Revised Code;

(21) Discriminate against any person in the selling, brokering, or appraising of real property because of race, color, religion, sex, familial status, ancestry, disability, or national origin;

(22) Fail to design and construct covered multifamily dwellings for first occupancy on or after June 30, 1992, in accordance with the following conditions:

(a) The dwellings shall have at least one building entrance on an accessible route, unless it is impractical to do so because of the terrain or unusual characteristics of the site.

(b) With respect to dwellings that have a building entrance on an accessible route, all of the following apply:

(i) The public use areas and common use areas of the dwellings shall be readily accessible to and usable by persons with a disability.

(ii) All the doors designed to allow passage into and within all premises shall be sufficiently wide to allow passage by persons with a disability who are in wheelchairs.

(iii) All premises within covered multifamily dwelling units shall contain an accessible route into and through the dwelling; all light switches, electrical outlets, thermostats, and other environmental controls within such units shall be in accessible locations; the bathroom walls within such units shall contain reinforcements to allow later installation of grab bars; and the kitchens and bathrooms within such units shall be designed and constructed in a manner that enables an individual in a wheelchair to maneuver about such rooms.

For purposes of division (H)(22) of this section, "covered multifamily dwellings" means buildings consisting of four or more units if such buildings have one or more elevators and ground floor units in other buildings consisting of four or more units.

(I) For any person to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice defined in this section or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code.

(J) For any person to aid, abet, incite, compel, or coerce the doing of any act declared by this section to be an unlawful discriminatory practice, to obstruct or prevent any person from complying with this chapter or any order issued under it, or to attempt directly or indirectly to commit any act declared by this section to be an unlawful discriminatory practice.

(K)(1) Nothing in division (H) of this section shall bar any religious or denominational institution or organization, or any nonprofit charitable or educational organization that is operated, supervised, or controlled by or in connection with a religious organization, from limiting the sale, rental, or occupancy of housing accommodations that it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference in the sale, rental, or occupancy of such housing accommodations to persons of the same religion, unless membership in the religion is restricted on account of race, color, or national origin.

(2) Nothing in division (H) of this section shall bar any bona fide private or fraternal organization that, incidental to its primary purpose, owns or operates lodgings for other than a commercial purpose, from limiting the rental or occupancy of the lodgings to its members or from giving preference to its members.

(3) Nothing in division (H) of this section limits the applicability of any reasonable local, state, or federal restrictions regarding the maximum number of occupants permitted to occupy housing accommodations. Nothing in that division prohibits the owners or managers of housing

accommodations from implementing reasonable occupancy standards based on the number and size of sleeping areas or bedrooms and the overall size of a dwelling unit, provided that the standards are not implemented to circumvent the purposes of this chapter and are formulated, implemented, and interpreted in a manner consistent with this chapter and any applicable local, state, or federal restrictions regarding the maximum number of occupants permitted to occupy housing accommodations.

(4) Nothing in division (H) of this section requires that housing accommodations be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.

(5) Nothing in division (H) of this section pertaining to discrimination on the basis of familial status shall be construed to apply to any of the following:

(a) Housing accommodations provided under any state or federal program that have been determined under the "Fair Housing Amendments Act of 1988," 102 Stat. 1623, 42 U.S.C.A. 3607, as amended, to be specifically designed and operated to assist elderly persons;

(b) Housing accommodations intended for and solely occupied by persons who are sixty-two years of age or older;

(c) Housing accommodations intended and operated for occupancy by at least one person who is fifty-five years of age

or older per unit, as determined under the "Fair Housing Amendments Act of 1988," 102 Stat. 1623, 42 U.S.C.A. 3607, as amended.

(L) Nothing in divisions (A) to (E) of this section shall be construed to require a person with a disability to be employed or trained under circumstances that would significantly increase the occupational hazards affecting either the person with a disability, other employees, the general public, or the facilities in which the work is to be performed, or to require the employment or training of a person with a disability in a job that requires the person with a disability routinely to undertake any task, the performance of which is substantially and inherently impaired by the person's disability.

(M) Nothing in divisions (H)(1) to (18) of this section shall be construed to require any person selling or renting property to modify the property in any way or to exercise a higher degree of care for a person with a disability, to relieve any person with a disability of any obligation generally imposed on all persons regardless of disability in a written lease, rental agreement, or contract of purchase or sale, or to forbid distinctions based on the inability to fulfill the terms and conditions, including financial obligations, of the lease, agreement, or contract.

(N) An aggrieved individual may enforce the individual's rights relative to discrimination on the basis of age as provided for in this section by instituting a civil action, within one hundred eighty days after the alleged unlawful discriminatory practice occurred, in any court with jurisdiction for any legal or equitable relief that will effectuate the individual's rights.

A person who files a civil action under this division is barred, with respect to the practices complained of, from instituting a civil action under section 4112.14 of the Revised Code and from filing a charge with the commission under section 4112.05 of the Revised Code.

(O) With regard to age, it shall not be an unlawful discriminatory practice and it shall not constitute a violation of division (A) of section 4112.14 of the Revised Code for any employer, employment agency, joint labor-management committee controlling apprenticeship training programs, or labor organization to do any of the following:

(1) Establish bona fide employment qualifications reasonably related to the particular business or occupation that may include standards for skill, aptitude, physical capability, intelligence, education, maturation, and experience;

(2) Observe the terms of a bona fide seniority system or any bona fide employee benefit plan, including, but not limited to, a retirement, pension, or insurance plan, that is not a subterfuge to evade the purposes of this section. However, no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual, because of the individual's age except as provided for in the "Age Discrimination in Employment Act Amendment of 1978," 92 Stat. 189, 29 U.S.C.A. 623, as amended by the "Age Discrimination in Employment Act Amendments of 1986," 100 Stat. 3342, 29 U.S.C.A. 623, as amended.

(3) Retire an employee who has attained sixty-five years of age who, for the two-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if the employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of those plans, of the employer of the employee, which equals, in the aggregate, at least forty-four thousand dollars, in accordance with the conditions of the "Age Discrimination in Employment Act Amendment of 1978," 92 Stat. 189, 29 U.S.C.A. 631, as amended by the "Age Discrimination in Employment Act Amendments of 1986," 100 Stat. 3342, 29 U.S.C.A. 631, as amended;

(4) Observe the terms of any bona fide apprenticeship program if the program is registered with the Ohio apprenticeship council pursuant to sections 4139.01 to 4139.06 of the Revised Code and is approved by the federal committee on apprenticeship of the United States department of labor.

(P) Nothing in this chapter prohibiting age discrimination and nothing in division (A) of section 4112.14 of the Revised Code shall be construed to prohibit the following:

(1) The designation of uniform age the attainment of which is necessary for public employees to receive pension or other retirement benefits pursuant to Chapter 145., 742., 3307., 3309., or 5505. of the Revised Code;

(2) The mandatory retirement of uniformed patrol officers of the state highway patrol as provided in section 5505.16 of the Revised Code;

(3) The maximum age requirements for appointment as a patrol officer in the state highway patrol established by section 5503.01 of the Revised Code;

(4) The maximum age requirements established for original appointment to a police department or fire department in sections 124.41 and 124.42 of the Revised Code;

(5) Any maximum age not in conflict with federal law that may be established by a municipal charter, municipal ordinance, or resolution of a board of township trustees for original appointment as a police officer or firefighter;

(6) Any mandatory retirement provision not in conflict with federal law of a municipal charter, municipal ordinance, or resolution of a board of township trustees pertaining to police officers and firefighters;

(7) Until January 1, 1994, the mandatory retirement of any employee who has attained seventy years of age and who is serving under a contract of unlimited tenure, or similar arrangement providing for unlimited tenure, at an institution of higher education as defined in the "Education Amendments of 1980," 94 Stat. 1503, 20 U.S.C.A. 1141(a).

(Q)(1)(a) Except as provided in division (Q)(1)(b) of this section, for purposes of divisions (A) to (E) of this section, a

disability does not include any physiological disorder or condition, mental or psychological disorder, or disease or condition caused by an illegal use of any controlled substance by an employee, applicant, or other person, if an employer, employment agency, personnel placement service, labor organization, or joint labor-management committee acts on the basis of that illegal use.

(b) Division (Q)(1)(a) of this section does not apply to an employee, applicant, or other person who satisfies any of the following:

(i) The employee, applicant, or other person has successfully completed a supervised drug rehabilitation program and no longer is engaging in the illegal use of any controlled substance, or the employee, applicant, or other person otherwise successfully has been rehabilitated and no longer is engaging in that illegal use.

(ii) The employee, applicant, or other person is participating in a supervised drug rehabilitation program and no longer is engaging in the illegal use of any controlled substance.

(iii) The employee, applicant, or other person is erroneously regarded as engaging in the illegal use of any controlled substance, but the employee, applicant, or other person is not engaging in that illegal use.

(2) Divisions (A) to (E) of this section do not prohibit an employer, employment agency, personnel placement service,

labor organization, or joint labor-management committee from doing any of the following:

(a) Adopting or administering reasonable policies or procedures, including, but not limited to, testing for the illegal use of any controlled substance, that are designed to ensure that an individual described in division (Q)(1)(b)(i) or (ii) of this section no longer is engaging in the illegal use of any controlled substance;

(b) Prohibiting the illegal use of controlled substances and the use of alcohol at the workplace by all employees;

(c) Requiring that employees not be under the influence of alcohol or not be engaged in the illegal use of any controlled substance at the workplace;

(d) Requiring that employees behave in conformance with the requirements established under "The Drug-Free Workplace Act of 1988," 102 Stat. 4304, 41 U.S.C.A. 701, as amended;

(e) Holding an employee who engages in the illegal use of any controlled substance or who is an alcoholic to the same qualification standards for employment or job performance, and the same behavior, to which the employer, employment agency, personnel placement service, labor organization, or joint labor-management committee holds other employees, even if any unsatisfactory performance or behavior is related to an employee's illegal use of a controlled substance or alcoholism;

(f) Exercising other authority recognized in the "Americans with Disabilities Act of 1990," 104 Stat. 327, 42 U.S.C.A. 12101, as amended, including, but not limited to, requiring employees to comply with any applicable federal standards.

(3) For purposes of this chapter, a test to determine the illegal use of any controlled substance does not include a medical examination.

(4) Division (Q) of this section does not encourage, prohibit, or authorize, and shall not be construed as encouraging, prohibiting, or authorizing, the conduct of testing for the illegal use of any controlled substance by employees, applicants, or other persons, or the making of employment decisions based on the results of that type of testing.